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November 25, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 9, 2009

Case Number: TSO-0766

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization 1/ under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should be restored.

I. Background

The individual is employed at a Department of Energy (DOE) facility where her work requires her to have an access authorization. During a background investigation, the local DOE security office discovered some derogatory information that created a security concern. DOE asked the individual to participate in Personnel Security Interviews (PSIs) in order to resolve the information. The PSIs did not resolve the security concerns.

On May 7, 2009, the local DOE security office (LSO) sent a letter (Notification Letter) advising the individual that it possessed reliable information that created a substantial doubt regarding her eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (f) and (l) (hereinafter referred to as Criteria F and L, respectively). 2/

1/ Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

2/ Criterion F concerns information that the individual has "misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire or a Questionnaire for Sensitive Positions, Personnel Qualifications Statement, a Personnel Security Interview, written or oral statements made in response to an official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization. . . ." 10 C.F.R. § 710.8(f). Criterion L relates, in relevant part, to information that a person has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason
(continued...)

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case. At the hearing that I convened, the individual presented her own testimony and that of two other witnesses. The DOE counsel did not present any witnesses. The individual and the DOE submitted a number of written exhibits prior to and during the hearing.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denial"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring her access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization in favor of the national security. *Id.*

2/ (...continued)

to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security" 10 C.F.R. § 710.8(l).

III. The Notification Letter and the Security Concerns at Issue

As stated above, the LSO cites two potentially disqualifying criteria as bases for suspending the individual's security clearance, Criteria F and L. The LSO's Criterion F concerns are predicated on the individual's conflicting responses made during two PSIs in which she discusses her husband's drug-related arrests and marijuana use.

From a security standpoint, misrepresentations or false statements made by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See Personnel Security Hearing*, Case No. TSO-0708 (2009); *Personnel Security Hearing*, Case No. TSO-0684 (2009); *see also* Guideline E of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House.

As for Criterion L, the LSO relies on the information cited above with respect to Criterion F as well as alleges that the individual made various statements during February and June PSIs regarding her decision to remain associated with her husband despite his drug usage, her husband's drug arrests, her living arrangement with her husband and her acknowledgment that her continued association with her husband could adversely affect her clearance eligibility. These statements raise concerns about the individual's vulnerability to blackmail, exploitation, and duress which call into question the individual's judgment, reliability, trustworthiness and her ability to protect classified information. *See id.* at Guideline E.

IV. Findings of Fact

The individual had held a security clearance since 1994. On October 31, 2005, the individual voluntarily reported that her husband had been arrested in August 2005. ^{3/} *See* Indiv. Exh. A. In December 2008, as a result of a background investigation, the individual participated in a PSI in which she acknowledged that her husband had been arrested in August 2005 and charged with Possession of a Firearm with the Intent to Go Armed, Driving on a Suspended/Revoked License, and Possession of Methamphetamine. *See* DOE Exhibit 9. During this interview, the individual stated that her husband explained to her that the Methamphetamine was in the vehicle because he was helping friends move and the friends must have left the drugs inside the vehicle. *Id.* She also stated that her husband had used marijuana in the past and when asked if he still uses marijuana occasionally she responded, "I don't know, but not to my knowledge." In addition, during this interview, the individual was cautioned about how her future association with criminals or individuals that use illegal drugs could impact her security clearance. The individual stated that she

^{3/} During the hearing, the individual stated that there was a delay in reporting because she did not become aware of her husband's arrest until October 2005. She further stated that at the time of the incident she was separated from her husband. Transcript of Hearing (Tr.) at 43.

understood those concerns. *Id.* In January 2009, the individual reported that her husband had again been arrested and charged with Possession of Marijuana and Intent to Go Armed. In February 2009, the individual participated in another PSI in which she was questioned about her husband's recent arrest. The individual indicated that her husband was driving her truck at the time of the arrest. When questioned about her husband's marijuana use this time, the individual stated that she believed her husband occasionally uses marijuana. During this interview, the individual attempted to clarify that any statement she may have made in a previous interview about her husband not using illegal drugs applied only to "crack or meth or anything like that . . ." *See* Statement of Charges at 1 and 2.

During this February 2009 PSI, the individual also indicated that she knew her husband used marijuana occasionally, but has told him that he is not to use it around her or in her house. DOE Exhibit 9. She further indicated that she has warned her husband that his behavior could jeopardize her security clearance. *Id.* Although the individual indicated that some of her husband's associates and family members use illegal drugs, she stated that she does not condone the behavior. She added that she would not divorce her husband "just to keep her job" because her marital vows are important to her. *Id.* On June 8, 2009, the individual reported that her husband had been arrested again on drug and weapons charges, as well as for evading arrest. *Id.* During a June 2009 PSI, the individual confirmed the arrest and stated that her husband had illegal drugs in his possession at the time of his arrest. She also explained that she and her husband are "unofficially" separated due to her concern about her personal safety and that they currently share a residence "part of the time," stating that her husband stays at her house often. *Id.* The individual indicated that, in the fourteen years she has been married, she has observed her husband using marijuana but has not observed him using marijuana in recent years. Finally, during the June 2009 PSI, the individual acknowledged that she has been advised that her continued association with her husband could adversely affect her clearance eligibility, but stated that she can not control her husband's behavior. *See* Statement of Charges at 3-5.

V. Hearing Officer Evaluation of the Evidence

The threshold question before me with regard to Criterion F is whether the individual deliberately misrepresented information during PSIs concerning her responses to questions about her husband's illegal drug use and her association with him. Based on the testimonial evidence adduced at the hearing, I find that the individual's misrepresentations were not deliberate in nature.

During the hearing, the individual testified that her husband has suffered from mental illness, Bipolar Disorder, for a number of years. Tr. at 43. She stated that sometime around 2004, her husband's behavior became aggressive in the house (not towards her), i.e., he was destroying furniture and throwing items in the house. *Id.* She testified that she was concerned for her safety and moved out of the house. *Id.* The individual further testified that in August 2005, after her husband was arrested for, *inter alia*, Possession of a Firearm with the Intent to Go Armed and Possession of Methamphetamine, she reported the incident to the LSO in October 2005. *Id.* She recalled that when she was interviewed in a December 2008 PSI, she was asked whether or not her husband used Methamphetamine and she responded "no." *Id.* at 46. However, when questioned about her

husband's marijuana use, the individual testified that she was aware that her husband had occasionally smoked marijuana in the past, but did not know whether he was presently using marijuana. *Id.* at 47. She acknowledged during this 2008 PSI that when questioned as to whether her husband still occasionally uses marijuana, she responded "I don't know, but not to my knowledge." *Id.* During the hearing, the individual reiterated that she does not know whether the individual currently uses marijuana because "he never uses it in [her] presence." *Id.* She also clarified that her husband did not use Methamphetamine, but she was not trying to imply that she did not know that her husband used marijuana. *Id.* at 53. The individual asserted that at no time during her PSIs did she intentionally omit, falsify or misrepresent information regarding her husband's marijuana use. *Id.* at 48. She reiterated that all of her responses to questions during her various PSIs have been consistent and accurate to the best of her knowledge. *Id.* at 50. The individual testified that after each of her husband's three arrests, she promptly and voluntarily reported this information to the LSO. *Id.*

During the hearing, the individual presented the testimony of two security officers. Security Officer #1 testified that she has known the individual since 1994. She testified that the individual truthfully and promptly reported her husband's arrests when they occurred. *Id.* at 13, 16. Security Officer #1 further testified that the individual has always been forthcoming and thorough in providing information about her husband's criminal behavior and stated that the individual's "integrity is definitely intact." *Id.* at 19. She testified that neither DOE Orders nor the individual's security briefings require the individual to report incidents on anyone other than herself. *Id.* at 20. Security Officer #1 reiterated that the individual has gone "the extra mile" as it pertains to reporting her husband's arrests. *Id.* She testified that the individual also felt a need to go beyond her reporting requirements to apprise her of the non-criminal matters, i.e., her separation, as well. Security Officer #1 added that, although confidential, this information is in the individual's security file. *Id.* at 21. Finally, Security Officer #1 testified that she has never been concerned that the individual would not do what is in the best interest of national security.

Likewise, Security Officer #2, who has known the individual for 2 and one-half years, also testified that the individual promptly reported all incidents related to her husband. *Id.* at 31. She explained that, at the individual's request, she accompanied her to the June 2009 PSI and read and listened to the audio of the transcripts. Security Officer #2 testified that she noted one inconsistency in the individual's response regarding her husband's marijuana use, but attributed it to the fact that the question was not posed very well. *Id.* at 32. She believes the individual answered the question to the best of her ability and did not seek to intentionally mislead or provide false information. *Id.* at 33. According to Security Officer #2, there is no evidence that the individual poses a security risk, adding that none of her husband's criminal activities have ever been associated with her. *Id.* She corroborated the individual's testimony that the individual's husband does not use marijuana around her. *Id.* at 34. Security Officer #2 testified that the individual is an honest, trustworthy and reliable person. *Id.*

After considering all of the evidence before me, I find that the individual has mitigated the security concerns arising from her PSIs in which she discussed her husband's arrests and marijuana use. I found the individual's testimony that she did not intentionally or deliberately falsify, misrepresent

or provide inconsistent information regarding her husband to be very credible. During the hearing, the individual was questioned about what appears to be an inconsistency in the record when she discussed whether she knew that her husband occasionally used marijuana. However, during the hearing, the individual clarified the inconsistent responses and testified that she knew her husband occasionally used marijuana in the past, but does not know whether he presently uses it because he does not use drugs around her. The individual's witnesses, which included two security officers, persuasively testified that the individual is an honest, trustworthy and reliable person who has consistently been forthcoming about her husband's criminal behavior. One witness offered particularly persuasive testimony in explaining that the individual goes above and beyond what is required of her reporting obligations. They both testified that the individual possessed the utmost integrity. It was my observation during the hearing that the individual was well-prepared and took the proceeding seriously. She also understands the importance of being completely honest with the DOE. For the foregoing reasons, I find that the individual has mitigated the security concerns raised by Criterion F.

With respect to Criterion L and the LSO's security concern that the individual made various statements during PSIs regarding her decision to remain associated with her husband despite his drug usage, her husband's drug arrests, her living arrangement with her husband, and her acknowledgment that her continued association with her husband could adversely affect her clearance, the individual convincingly testified that she has never been associated with her husband's criminal activities, nor does she allow her husband to engage in any criminal activity around her. During the hearing, the individual described her current relationship with her husband and future plans regarding her marriage. She testified that she does not discuss her work with her husband or anyone else. *Id.* The individual explained that she was not living with her husband when his first arrest occurred in 2005 and stated that currently she and her husband maintain separate homes, which involves her husband staying at her house at least several days a week. *Id.* at 51. She also testified that her husband has access to her home when she is not present as well as has access to her vehicle. However, she added that if she believes her husband is not thinking clearly, she does not give him access to her keys. *Id.* at 52. She testified that she has told her husband "on numerous occasions that he is absolutely never to have any drugs in my vehicles, near me or anything." *Id.* at 57. The individual also stated that she has informed the individual about the effect his behavior is having on her job and security clearance eligibility. *Id.* at 58. The individual does not believe that her husband is unconcerned about these effects, but rather that he does not understand the significance. *Id.* The individual reiterated that her conduct or behavior has not been impacted in any way during the periods of time when her husband was arrested nor has she ever been vulnerable to pressure, coercion or blackmail. *Id.* at 50. The individual testified that she understands DOE's concern regarding her husband's illegal drug use and her association with people involved in criminal activities. However, the individual reiterated that she would never jeopardize her security clearance in any way. *Id.* The individual further testified that she takes her marriage vows seriously and has no intention of divorcing her husband unless it becomes "absolutely necessary." *Id.* at 50.

During the hearing, the individual testified about her husband's mental illness and how she believes it contributes to his criminal behavior. *Id.* at 58. According to the individual, her husband has been diagnosed with several illnesses, including Bipolar Disorder. *Id.* She added that he has been hospitalized twice since they have been married and has undergone psychiatric treatment in the past.

Id. However, the individual stated that her husband now “flatly” refuses any treatment. *Id.* The individual also stated that her husband receives a disability check and that she is the custodian of his money. *Id.* at 73. The individual maintains that, although she has frequent contact with her husband, she cannot control his behavior, but she can control her conduct. *Id.* She added that she could not imagine any circumstances where she would compromise the national security in order to protect her husband. *Id.* at 60. Finally, the individual testified that although her marriage has deteriorated due to her husband’s mental illness, she reiterated that he has never engaged in illegal activities around her, nor has he physically threatened her in any way. *Id.* at 57. While the individual testified that she does not condone her husband’s criminal activities, and has made this clear to him, she acknowledges that, in light of his illness and their long relationship, she will support him when he is willing to get help. *Id.* at 73.

I am convinced from the individual’s testimony that the individual’s desire to remain married to her husband stems from a desire to remain committed to her marriage vows and is not an indication that she condones her husband’s behavior. Although it appears that the individual’s husband is somewhat dependent upon her and that the individual acts more like a guardian, i.e., being the custodian of her husband’s disability check, the individual has convinced me that she is not vulnerable to blackmail and coercion. Her witnesses testified that she possesses good judgment, the utmost integrity and has demonstrated that she would not compromise national security because of her husband’s criminal behavior. After considering the “whole person,” I am convinced that the DOE can rely on the individual’s ability to make sound judgment calls regarding the safeguarding of classified information. *See* Adjudicative Guidelines at (2)a. I therefore find that the individual has sufficiently mitigated the LSO’s concerns under Criterion L.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria F and L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I find that the individual has brought forth convincing evidence to mitigate the security concerns associated with Criteria F and L. I therefore find that restoring the individual’s access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual’s access authorization should be restored. The parties may

seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: November 25, 2009